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JOAN FUNG

v.

ALLIANZ GENERAL INSURANCE COMPANY (MALAYSIA) BHD

B

HIGH COURT SABAH & SARAWAK, SANDAKAN
LEE HENG CHEONG JC
[SUIT NO: S 22-48-2009]
12 APRIL 2011

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CIVIL PROCEDURE: *Pleadings - Failure to plead material issue - Illegality - Whether court may take cognizance of illegality at any stage even though not pleaded*

D

CONTRACT: *Void contract - Contrary to public policy - Whether gratuity payable to retiring/resigning employees under retirement benefit scheme subject to deduction of employer's contributions to Employees Provident Fund (EPF) - Contract permitting deductions in contravention of s. 9(1) of the Employees Provident Fund Act 1951 and s. 47(1) of the Employees Provident Fund Act 1991 - Section 9 and/or s. 47(1) prohibit contracting out or waiver - Whether employee estopped from claiming refund of deducted sum - Contracts Act 1950, s. 66*

E

LABOUR LAW: *Provident fund - Contributions - Retirement benefit fund - Allegations of wrongful deductions - Whether deductions contravened s. 9(1) of the Employees Provident Fund Act 1951 and s. 47(1) of the Employees Provident Fund Act 1991 - Whether ultra vires*

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The plaintiff was employed by AFIA Worldwide Insurance ("AFIA") as a clerk/typist on 25 May 1971. She was subsequently appointed as American Malaysian Insurance Sdn Bhd's assistant branch manager. American Malaysian Insurance Sdn Bhd was converted into a public company limited by shares bearing the name of American Malaysian Insurance Berhad on 25 November 1994. Subsequently, American Malaysian Insurance Berhad changed its name to AMI Insurans Berhad. The plaintiff was later promoted to the position of Senior Manager in AMI Insurans Berhad. AMI Insurans Berhad later changed its name to Commerce Assurance Berhad ("CAB"). By virtue of a vesting order dated 9 December 2008, all rights, assets and liabilities of CAB were transferred and vested with the defendant. The plaintiff was never at any time, an employee of the defendant. During the

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plaintiff's employment with the respective companies above, she was privileged with a retirement benefit scheme as provided under the AFIA and YOU Booklet ("the Booklet") which formed part of the terms and conditions of her employment. The retirement benefit scheme was set up by AFIA whereby long serving employees were given gratuity payments under the terms and conditions of the AFIA and YOU Booklet and was not statutorily required. Sometime in April 2006, the plaintiff was provided with an option by CAB to either (a) forgo her retirement benefits under the Booklet in exchange for an increase in salary; or (b) maintain her current retirement benefits under the Booklet with no salary adjustment. The plaintiff agreed to maintain her retirement benefits under the Booklet with no salary adjustment and further agreed not to pursue any legal action against CAB. The plaintiff subsequently resigned from her employment with CAB on 21 July 2008. The gross total gratuity payment received by the plaintiff was RM120,075 *ie,* the retirement benefits under the Booklet of RM358,604 minus the employer's contributions to the Employee Provident Fund ("EPF") of RM238,529. Clause 12(3) of AFIA AND YOU Booklet had express provisions for deduction of the employers' EPF contribution. The plaintiff received the said sum without any objection. However, subsequently the plaintiff commenced this action claiming that the defendant's act in deducting the sum of RM238,529 from the employer's portion of the plaintiff's EPF account contravened the provisions of s. 9 of the Employees Provident Fund Act 1951 ("s. 9") and/or s. 47 of the Employee Provident Fund Act 1991 ("s. 47"). Hence, the plaintiff sought a sum of RM238,529 from the defendant.

Held (allowing the plaintiff's claim):

(1) There is no principle of law *(ratio decidendi)* that was laid down by the Federal Court in *Chong Thian Fook & Ors v. Sarawak Shell Bhd & Ors* and therefore, the case of *Chong Thian Fook* did not bind this court and could be distinguished on the facts. The Federal Court in *Chong Thian Fook supra* was dealing with very different contractual terms. The Federal Court in *Chong Thian Fook & Ors v. Sarawak Shell Bhd & Ors supra* did not actually deliver a decision based on s. 9 or s. 47(1). (para 17)

(2) The legal meaning of s. 9 and/or s. 47(1) was clear. The operative elements of the section consists of three components, namely: (i) Notwithstanding any contract to the contrary; (ii) Employer shall not deduct or recover his portion of the EPF contribution; (iii) From the employees' wages or remuneration. (para 19)

(3) The plaintiff was not estopped from claiming the sum of RM238,529. The defendants' contention went against the clear and unambiguous words of s. 9 and/or s. 47(1). The words 'Notwithstanding any contract to the contrary' were clearly meant to prevent parties especially employers from circumventing the prohibition in the Employees' Provident Fund Acts by way of any contract whatsoever. (para 20)

(4) It is a fundamental principle of law that an estoppel cannot prevail against a statue, a common law of public policy or protect against an illegality. Since the Employees' Provident Fund Acts are essentially social legislations to protect the employees' interest, courts must therefore give effect to them in the interest of public policy. This is especially so when it comes to s. 9(1) and s. 47(1) whereby it is expressly provided that a breach of the same is illegal and a punishable offence. (para 20)

(5) Section 9 and/or s. 47(1) prohibit contracting out or waiver. (para 21)

(6) The defence of illegality was never raised in the defendants' pleadings but was only raised after the trial. Nonetheless, it is trite law that it is always open to a court to take cognizance of illegality at any stage of the proceedings even though it is not pleaded. (para 23)

(7) The knowledge of the parties were never made into an issue. The defendant never pleaded that the plaintiff was aware of the illegality or *vice versa*. Clearly, this was a non-issue. As such, s. 66 Contracts Act 1950 empowered the sums that have been deducted to be returned to the plaintiff. In any event, the defendants fell foul of the principle of *Allegans suam turpitudinem non est audiendus* (a person alleging his own wrongdoing is not to be heard). (para 23)

Case(s) referred to:
Chong Thian Fook & Ors v. Sarawak Shell Bhd & Ors [2009] 5 CLJ 605 FC ***(dist)***
Kok Hoong v. Leong Cheong Kweng Mines, Ltd [1964] 1 All ER 300 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 66
Employees Provident Fund Act 1951, s. 9(1)
Employee Provident Fund 1991, s. 47(1)
Interpretations Acts 1948 and 1967, s. 17A

For the plaintiff - Chris Thian; M/s Chris Thian & Co
For the defendant - Roger Chin; M/s Chin Lau Wong & Foo

Reported by Amutha Suppayah

JUDGMENT

Lee Heng Cheong JC:

Introduction And Undisputed Facts

[1] The plaintiff was employed by AFIA Worldwide Insurance as a clerk/typist on 25 May 1971. She was subsequently appointed as American Malaysia Insurance Sendirian Berhad's assistant branch manager. American Malaysian Insurance Sendirian Berhad was converted into a public company limited by shares bearing the name of American Malaysian Insurance Berhad on 25 November 1994. Subsequently, Amerian Malaysian Insurance Berhad changed its name to AMI Insurans Berhad on 11 June 1999. The plaintiff was later promoted to the position of Senior Manager in AMI Insurans Berhad, with effect from 1 April 2004. Sometime in 2005, AMI Insurans Berhad changed its name to Commerce Assurance Berhad.

[2] By virtue of a vesting order dated 9 December 2008, all rights, assets and liabilities of Commerce Assurance Berhad were transferred and vested with the defendant *vide* Kuala Lumpur High Court Suit No: D7-26-98-2008. The plaintiff was never at any time, an employee of the defendant.

[3] During the plaintiff's employment with the respective companies above, she was privileged with are retirement benefit scheme as provided under the AFIA and YOU Booklet ("the booklet") which formed part of the terms and conditions of her employment.

[4] The retirement benefit scheme was set up by AFIA World Wide Insurance whereby long serving employees were given gratuity payments under the terms and conditions of the AFIA and YOU Booklet and is not statutorily required.

[5] The salient terms in respect of the amount of any gratuity payment payable to the plaintiff under the Booklet are set out below:

Retirement Benefit

Clause 2: If an employee shall have served AFIA for a continuous period of not less than seven years last preceding the date of his retirement, on such employee's retirement at the age of 55 years or after that age AFIA shall pay to such employee a gratuity of one full month's salary for every completed year of service with AFIA.

Clause 3: There shall be adjusted or set of against the amount of the gratuity due to an employee at the date of his retirement:

(i) AFIA's total contributions in respect of such employee to the Employee Provident Fund in the States of Malaysia, paid by AFIA at the current rates under the existing laws of the Government of the States of Malaysia prevailing and in force from time to time Provided that nothing in this benefit shall enable AFIA to recover from such employee any contribution or any part thereof paid by AFIA, in respect of such employee, either directly or indirectly, which is not recoverable by AFIA under the provisions of the laws of the respective territories relating to the Funds hereinbefore mentioned.

Voluntary Resignation Benefit

If an employee voluntarily resigns after having served AFIA for a continuous period of not less than ten years but before he attains the age of 55 years AFIA shall upon such resignation pay to him

a percentage of the gratuity that would have been payable to an employee retiring under the retirement benefits described above, such percentage to be in accordance with the scale as set out in the schedule below, provided that:

(a) The provisions of (3) above under the retirement benefit shall apply to the gratuity payable to an employee resigning under this benefit.

The Schedule is reflected as follows:

Name of Years of Continuous Service	The Percentage of Gratuity Applicable
10	50%
11	55%
12	60%
13	65%
14	70%
15	75%
16	80%
17	85%
18	90%
19	95%
20	100%

[6] Sometime in April 2006, the plaintiff was provided with an option by Commerce Assurance Berhad to either (a) forgo her retirement benefits under the Booklet in exchange for an increase in salary; or (b) maintain her current retirement benefits under the Booklet with no salary adjustment. This is due to the fact that her retirement benefits could not be harmonized with the other existing entities within the Commerce Group.

[7] In any election, the plaintiff would voluntarily agree not to pursue any legal action whatsoever against Commerce Assurance Berhad.

[8] The plaintiff subsequently agreed sometime in May 2006 that she would maintain her current retirement benefits under the Booklet with no salary adjustment and further agreed not to pursue any legal action against Commerce Assurance Berhad.

[9] The plaintiff subsequently resigned from her employment with Commerce Assurance Berhad *vide* a notice of resignation dated 17 July 2008. Commerce Assurance Berhad had accepted her resignation on 21 July 2008. On the same day, Commerce Assurance Berhad informed the plaintiff that the gross total gratuity payment in accordance with the formula provided for under the Booklet are as set out below:

Basic Salary	RM	9,692.00
Years in service	x	37
	RM	358,604.00
EPF Employer Portion		(RM238,529.00)
Gratuity Amount Payable	RM	120,075.00

[10] The plaintiff had accepted that her final gratuity payment amounting to RM120,075. *Vide* an e-mail dated 4 February 2009, the plaintiff had requested that the payment of the above sum less any statutory deduction be made to her CIMB Bank account.

[11] The defendant had subsequently on 11 February 2009, released payment in the sum of RM83,446.36 to the plaintiff.

[12] Prior to 11 February 2009, the plaintiff had never raised any issue or objected to the calculation of her retirement benefit scheme under the Booklet.

[13] The plaintiff in the course of her employment has been credited with the entire portion of her own and the defendant's predecessors' contributions to the Employees Provident Fund including the sum of RM238,529. Such sums remain to her credit and are unaffected by the gratuity scheme in the Booklet.

The Plaintiff's Claims

[14] In the plaintiff's statement of claim herein, the plaintiff is claiming in essence that the defendant's act in deducting the sum of RM238,529 from the Employees Provident Fund, employer's portion of the plaintiff's EPF account contravened the provisions of the Employees Provident Fund Act 1951 and/or s. 47 of the Employees Provident Fund Act 1991.

[15] The plaintiff claimed against the defendant for *inter alia* the followings;

(i) A declaration that the deduction of the Employer Portion of RM238,529 under the Employees Provident Fund by the defendant is unlawful, illegal, null and void;

(ii) the sum of RM238,529 from the plaintiff's Gratuity Voluntary Resignation Benefit;

(iii) interests

The Defendant's Defence

[16] The defendant's defence *inter alia* in essence is as follows:

(i) that the plaintiff has accepted, represented and agreed that any voluntary resignation benefit provided to her upon her resignation shall be adjusted or set off against the amount of the employer's total contributions in respect of such employee to the Employees Provident Fund;

(ii) that s. 9 of the Employees Provident Fund Act 1951 and/or section 47 of the Employees Provident Fund Act 1991 are not applicable here as the defendant and/or Commerce Assurance Berhad is not making any deduction but rather applied cl. 12(3) of the AFIA AND YOU Booklet in achieving the total gratuity payment of RM120,075 paid to the plaintiff.

(iii) that the plaintiff is stopped from making any claim against the defendant by reason that the plaintiff had accepted such an arrangement that the total gratuity payment that would be paid is subject to the set-off or deduction from the employer's total contribution in respect of such employee to the EPF in arriving at the total gratuity amount.

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Issues To Be Tried

[17] From my reading and analysis of the pleadings and evidence adduced in this case, I find that the following issues are pertinent and relevant in disposing off this case and they are as follows:

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(i) Whether the Federal Court case of *Chong Thian Fook & Ors v. Sarawak Shell Bhd & Ors* [2009] 5 CLJ 605 is relevant and/or binding on this court?

(ii) Whether the defendants' deduction of RM238,529 (being the C employer's total contributions towards the Employees' Provident Fund) of which deduction was made pursuant cl. 12(3) of the AFIA AND YOU Booklet, was in contravention of s. 9 of the Employees Provident Fund Act 1951 and/or s. 47(1) of the Employees Fund Act 1991?

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(iii) Whether the plaintiff is estopped from claiming the sum of RM238,529?

(iv) Whether s. 9 of the Employees Provident Fund Act 1951 and/or s. 47(1) of the Employees Provident Fund Act 1991 E prohibited contracting out or waiver?

(v) Whether estoppel, waiver or acquiescence can prevail against a statute of public policy or to protect against an illegality?

F (vi) Whether the defendant can rely on a defence of illegality to bar the plaintiff's claim?

Consideration Of The Issues

[18] Whether the Federal Court case of *Chong Thian Fook & Ors* G *v. Sarawak Shell Bhd supra* is relevant and/or binding on this court?

(i) I shall first deal with this issue as if I were to rule that the Federal Court case of *Chong Thian Fook v. Sarawak Shell, supra*, is relevant and binding on this court, then I have no H alternative but to dismiss the plaintiff's claim herein.

(ii) The defendants submitted that this court is *stare decisis* bound by the decision of the Federal Court in *Chong Thian Fook v. Sarawak Shell Bhd, supra*. I shall now proceed to examine the I judgments of the Federal Court in *Chong Thian Fook v. Sarawak Shell, supra*. In determining whether this court is bound, I will have to determine the *ratio decidendi* of the Federal Court in *Chong Thian Fook v. Sarawak Shell, supra*.

(iii) I find that there is no principle of law *(ratio decidendi)* that was laid down by the Federal Court in *Chong Thian Fook, supra*, therefore, the case of *Chong Thian Fook, supra* does not bind this court and can be distinguished on the facts on the following grounds. The Federal Court in *Chong Thian Fook, supra* was dealing with very different contractual terms. Unlike the AFIA AND YOU Booklet terms in the present case, which expressly stipulated a deduction or set off of the employers' EPF contribution, the Federal Court case of *Chong Thian Fook's* relevant contractual terms (known as reg. 5 and reg. 7) do not have express provisions for the deduction of employers' EPF contribution. The Federal Court in *Chong Thian Fook v. Sarawak Shell, supra* decided that since the lump sum calculation did not involve reg. 7, there was no necessity to embark on an interpretation of s. 47(1) of the EPF Act 1991 in order to determine whether there was contravention of the section.

(v) The facts of *Chong Thian Fook v. Sarawak Shell, supra* is different from the present case namely:

(1) Unlike the cl. 12(3) of the AFIA AND YOU Booklet terms which expressly provided for the deduction of the Employers' EPF Contribution, the relevant contractual terms in *Chong Thian Fook's* case are very different.

(2) The relevant terms of contract in *Chong Thian Fook v. Shell Sarawak supra* related to reg. 5 and reg. 7 of a scheme known as the Shell Sarawak & Sabah Retirement Benefit Fund ("RBF"). The RBF was established in 1976. Its historical set up went back to pre 1968 when it was called Shell Malaya Retiring Fund ("SMRF"). In 1968, the SMRF was wound up and the Shell Sarawak Sabah Pension Fund ("SSS Pension Fund") was put into place. In 1976, the SSS Pension Fund was dissolved and the RBF was established.

(3) The said reg. 5 provided the mechanism for calculating the benefit payable. Regulation 5(2) provided for a lump sum to be paid to the employee when he leaves the company. It also mentioned that the lump sum shall be calculated in accordance with subclause reg. 5(3) and that the sum will be reduced by authorised deductions at the said reg. 7.

(4) The exact wording of reg. 5 is as follows:

> 5. (1) When a Member leaves Company Service (other than a Member who dies in Company Service) the benefit due from this Fund shall be calculated in accordance with the following provisions of this regulation and the net amount thereof shall be settled in accordance with reg. 8. No benefit shall be due to a Member who leaves Company Service, other than at age 55 of chronic disability, with less than 5 years' Accredited Service (unless in view of some exceptional circumstances the Trustees at the request of the Employing Company determine otherwise)
>
> (2) The benefit due from this Fund shall be a lump sum sufficient to bring the aggregate of:
>
> (a) so much of a Member's balance at the time he leaves Company Service as amounts to:
>
> (aa) contributions for the period prior to 1st January 2001; and
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> (bb) contributions in respect of basic salary plus annual bonus for the period commencing 1st January 2001;
>
> made by his Employing Company or Companies for the time being (whether or not such Company or Companies are Member Companies of the Fund) during any period which counts as Accredited Service, plus interest thereon:
>
> (i) the Local Provident Fund, and
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> (ii) the State Fund, and
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> (iii) such other funds as the Trustees may from time to time designate for the purposes of this sub-clause; and
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> (b) the benefit (if any) actually paid by this Fund or by any such fund as is mentioned in or designated under paragraph (a) of this sub-clause in respect of any previous period of Company Service which is intended in his Accredited Service, up the level of benefit specified in sub-clause (3) hereof. In every case the lump sum shall be reduced by the Authorised Deductions mentioned in Reg. 7.

(3)(a) The lever of benefit applicable to a Member who

(i) has reached age 55, or

(ii) has reached age 50 and has left Company Service with the consent of his Employing Company, or

(iii) has left Company Service because of chronic disability,

shall be either the aggregate of

2.25 x Relevant Earnings x years of Accredited Service up to 31/12/1990,

2.8 x first M$1,000 of Relevant Earnings x years of Accredited Service from 1/1/1991,

2.5 x next M$1,000 of Relevant Earnings x years of Accredited Service from 1/1/1991

2.2 x balance of Relevant Earnings x years of Accredited Service from 1/1/1991;

Or

2.25 x Relevant Earnings x years of Accredited Service; whichever level of benefit is the greater.

(b) The level of benefit for each year of Accredited Service applicable to a Member who has not reached age 55 but has Accredited Service of 25 years or more shall be 2.25 x Relevant Earnings.

(5) Regulation 7(1)(c) stated as follows:

7. (1) The Authorised Deductions to be made in calculating the amount of a Member's benefit will be the sum of the following amounts:

(a) ...

(b) ...

(b) Subject to sub-clause (3) hereof, the amount of any payments which any Company shall be law or pursuant to any collective contract or to any award judgment or order of any Court or Tribunal be or have been required to make to the Member or any other person in respect of any

A part of the Member's Accredited Service by way of additional remuneration or benefit beyond his ordinary remuneration or in connection with any termination of his service with that Company; and for the purposes of this paragraph the expression "collective contract" shall mean any agreement between the employer and any trade union or group of employees or any body or person on behalf of any employees; compound interest on the amounts stated in this paragraph shall run from the respective dates of each payment down to the relevant date;

(6) The plaintiffs' contention in *Chong Thian Fook's* case *supra*, was that when they severally received their RBF entitlement from the defendants/employers, they discovered that from their entitlements, there had been made deductions of their employers' contributions to the EPF and the PF, and of interests or dividends declared on those contributions. They contended that the deductions were in contravention of law, particularly the EPF Act 1951 and 1991. The provisions of the EPF Acts that they contravened were s. 9(1) of the EPF Act 1951 and s. 47(1) of the EPF Act 1991 respectively.

(7) The defendant in *Chong Thian Fook's* case *supra*, denied the deductions. Their contention was that by virtue of the said reg. 5(2), the benefit due to a member from the RBF was a lump sum sufficient to bring the aggregate of the EPF and PF contributions and the interest on them up to the appropriate level specified in reg. 5(3), that the sufficient lump sum was therefore the difference between that level and the said aggregate, and that the payment of the lump sum did not involve any deduction whatsoever. The defendants' case, therefore, did not involve reg. 7(1)(c) at all.

(8) As can be seen, *Chong Thian Fook's* case dealt with different terms known as reg. 5 and reg. 7 and how the lump sum is to be calculated. It is pertinent to note that reg. 5 and reg. 7 do not expressly provide for the deduction of employers' EPF contribution. In contrast, cl. 12(3) of the AFIA AND YOU Booklet in the present case, expressly provided for EPF deduction in unequivocal terms as follows:

> There shall be **adjusted or set off against** the amount of gratuity due to an employee at the date of his retirement: (a) **AFIA' total contributions** in respect of such employee to the Central Provident Fund in Singapore and/or the Employees Provident Fund in the States of Malaysia (emphasis added)

(9) The Federal Court in *Chong Thian Fook v. Sarawak Shell, supra* at p. 606 also held:

> Held (3) The respondents were right in their stand that in arriving at the lump sum, they acted within reg. 5(2) and the manner in which they arrived at the lump sum **did not involve reg. 7.** As such, there **was no question of contravention of any of the relevant provisions in the 1951 Act and 1991 Act.**
>
> (4) **Reading reg. 7** as a whole, it **could not have been the intention** to include contributions into funds such as EPF. **It would have been so stated.** Reg. 7 was more related to any additional payments made or due to a member of RBF but did not extend to include contributions described in reg.5
> (emphasis added)

(10) In view of the above, I find that the Federal Court in *Chong Thian Fook v. Sarawak Shell, supra* did not actually deliver a decision based on s. 9 of the Employees Provident Fund Act 1951 and/or s. 47(1) of the Employees' Provident Fund Act 1991, that the remarks of "arithmetical formula" and "non deprivative deduction" were made in the absence of a proper determination of the legal meaning of s. 9 of the Employees Provident Fund Act 1951 and/or s. 47(1) of the EPF Act 1991 and that the relevant contractual terms in *Chong Thian Fook, supra* are not similar to the terms in the present case.

[19] Whether the defendants' deduction of RM238,529 (the employer's total contributions towards the Employees' Provident Fund) of which deduction was made pursuant cl. 12(3) of the AFIA AND YOU Booklet, was in contravention of s. 9 of the Employees Provident Fund Act 1951 and/or s. 47(1) of the Employees Provident Fund Act 1991?

(i) It is undisputed that cl. 12(3) of AFIA AND YOU Booklet has express provisions for deduction of the Employers' EPF contribution. The express provisions are:

A There shall be **adjusted or set off against** the amount of gratuity due to an employee at the date of his retirement: (a) **AFIA' total contributions** in respect of such employee to the Central Provident Fund in Singapore and/or the Employees Provident Fund in the States of Malaysia. (emphasis added)

B (ii) Section 9 of the Employees Provident Fund Act 1951 provides as follows:

(1) **Notwithstanding any contract to the contrary,** the employer **shall not** be entitled to **deduct** from the **wages or remuneration** of, or otherwise to recover from, the C employee, the **employer's contribution.** (emphasis added)

(iii) Section 47(1) EPF Act 1991 provides as follows:

(1) **Notwithstanding any contract to the contrary,** the D employer **shall not** be entitled to **deduct or otherwise recover** from the wages or remuneration of the employee, the **employer's contribution,** from the employee. (emphasis added)

(iv) Both s. 9 of the Employees Provident Fund Act 1951 and E s. 47 EPF Act 1991 respectively further provided criminal sanctions for breach of the respective sections.

(v) To answer the above issue, I would need to refer to the following and various principles of Statutory Interpretation F cited in Bennion on Statutory Interpretation (5th Edition) ("Bennion").

(1) The Plain Meaning Rule

It is a rule of law (in this Code called the plain meaning G rule) that where, in relation to the facts of the instant case:

(a) the enactment under inquiry is grammatically capable of one meaning only, and

H (b) on an informed interpretation of that enactment the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator, the legal meaning of the enactment corresponds to that grammatical meaning, and is to be applied accordingly

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(2) Presumption that Text is Primary Indication of Legal Meaning

In construing an enactment, the text of the enactment, in its setting within the Act or other instrument containing it, is to be regarded as the pre-eminent indication of the legislator's intention.

(3) Presumption that literal meaning to be followed

Prima facie, the meaning of an enactment which was intended by the legislation (in other words its legal meaning) is taken to be that which corresponds to the literal meaning.

(vi) Applying the above principles, the legal meaning of s. 9 of the Employees Provident Fund Act 1951 and/or s. 47(1) EPF 1991 is clear. There is nothing grammatically ambiguous about the meaning. The operative elements of the section consists of three components, namely:

(1) Notwithstanding any contract to the contrary;

(2) Employer shall not deduct or recover his portion of the EPF contribution;

(3) From the employees' wages or remuneration.

(vii) The 'plain meaning rule' must be subjected to s. 17A of the Interpretation Acts 1948 and 1967 which requires a purposive approach to any enactment.

17A. Regard to be had to the purpose of Act

In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

(viii) Bennion recognized this when he stated that there is a presumption that enactment to be given a purposive construction:

Parliament is presumed to intend that in construing an Act the court, by advancing the remedy which is indicated by the words of the Act for the mischief being dealt with, and the implications arising from those words, should aim to further

every aspect of the legislative purpose. A construction which promotes the remedy Parliament has provided to cure a mischief is now known as a purposive construction.

(ix) From the contention of the defendants herein, they are contending that that for a deduction to fall within s. 47(1) EPF Act 1991, there must be an actual deduction/deprivation/depletion of the monies paid into the employees' EPF account. In other words, the monies representing the defendants' EPF contribution that has been credited into the plaintiff's account with EPF must be physically deducted or recovered. The defendants are also contending that as long as what had been paid, remains intact and remains in credit in the plaintiff's EPF account, then there is no deduction within the meaning of s. 47(1) EPF Act 1991.

(x) Applying the above quoted principles of statutory interpretation in particular s. 17A Interpretations Acts 1948 and 1967 to the above contention of the defendants, I find that the defendants' above contention and construction in fact would defeat the very purpose for which, the Employees Provident Fund Act was enacted and would render s. 9 of the Employees Provident Fund Act 1951 and/or s. 47(1) of the EPF Act 1991, nugatory and obsolete.

(xi) In support of my above finding, I rely on the following rules and presumptions in Bennion:

(1) The Rule – *Ut Res Magis Valeat Quam Pereat*

(1) It is a rule of law that the legislator intends the interpreter of an enactment to observe the *maxix ut res magis valeat quam pereat* (**it is better for a thing to have effect that to be made void**); so that he must construe the enactment in such a way as **to implement, rather than defeat**, the **legislative purpose** (emphasis added)

(2) Bennion commented that "an Act must be construed so that its provisions are given force and effect rather than being rendered nugatory"[1]

(2) Construction Which Otherwise Defeats Legislative Purpose

> The principle requiring a construction against evasion is **not limited to cases of deliberate** or obvious evasion. It **extends to any way** by which an **Act's integrity of purpose** may be **undermined, even innocently or unwittingly.** (emphasis added)

(3) Presumption That Consequential Construction To Be Given.

Bennion said:

> It is presumed to be the legislator's intention that the court when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, **should assess the likely consequences of adopting each construction**, both to the parties in the case and (where similar facts arise in future cases) for the law generally. **If on balance**, the consequences of a particular construction are **more likely to be adverse than beneficent**, this is a factor **telling against that construction.** (emphasis added)

Therefore, in view of the above principles of statutory interpretation and the facts of the present case, I find that since the construction placed by the defendants leads to an adverse construction, this court ought not give it effect.

(4) Methods of Evasion: Doing Indirectly What Must Not Be Done Directly

Bennion said:

> Where an enactment prohibits the doing of a thing, the **prohibition is taken to extend to the doing of it by indirect or roundabout means, even though not expressly referred** to. (emphasis added)

I find that the defendants are doing indirectly what cannot be done directly in the circumstances of the present case.

[20] Whether the plaintiff is estopped from claiming the sum of RM238,529?

(i) The defendants contended that the plaintiff is estopped from claiming against the defendants on three grounds namely;

A (1) That the plaintiff was bound by the contractual terms of the booklet;

(2) That the plaintiff's acceptance of the terms of the Booklet and agreement not to commence legal proceedings against the company; and

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(3) That there was waiver on the part of the plaintiff not to commence this suit by acceptance of her final gratuity payment without any protest.

C (ii) I find that the plaintiff is not estopped from claiming the sum of RM238,529 based on the following grounds.

(1) The defendants' contention goes against the clear and unambiguous words of s. 9 of the Employees Provident Fund Act 1951 and/or s. 47(1) of the EPF Act, which provided at the very outset that:

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> **Notwithstanding any contract to the contrary,** the employer shall not be entitled to deduct ...
> (emphasis added)

E

As such, I find that Parliament's intention is clear. The words 'Notwithstanding any contract to the contrary' was clearly meant to prevent parties especially employers from circumventing the prohibition in the Act by way of any contract whatsoever.

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(2) Further Bennion stated that the wordings of the legislation can expressly prohibit contracting out of protection conferred on a person. This is illustrated by the principle known as *pacta private juri public derogare non possunt*. This is what Bennion said:

G

> **Where contracting out and waiver not allowed**
>
> Where a person is entitled by virtue to the performance of a duty by another person, and the case is within the principle *pacta private juri public derogare non possunt* (**a public right is not overridden by the agreements of private persons**), then the person under the duty cannot effectively contract out of performing it and the beneficiary cannot effectively waive its performance. (emphasis added)

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Bennion further stated that "the question whether it is possible to contract out, or waive performance, of a statutory duty depends always on the wording of the legislation. A well drafted modern Act makes the matter clear".

The wordings of s. 9 of the Employees Provident Fund Act 1951 and/or s. 47(1) EPF Act 1991 made it quite clear by the words "notwithstanding any contract to the contrary... "

(3) It is fundamental principle of law that an estoppel cannot prevail against a statute, a common law of public policy or protect against an illegality. Since the Employees' Provident Fund Acts are essentially social legislations to protect the employees' interest, courts must therefore give effect to in the interest of public policy.

This is especially so when it comes to ss. 9(1) and 47(1) of the EPF Acts whereby it is expressly provided that a breach of the same is illegal and a punishable offence.

(4) It is trite law, that a statute of public policy or to protect against an illegality is indefeasible by estoppels/waiver. This principle is referred to in the textbook, *Estoppel By Conduct And Election* by Mr Justice Kennedy Handley (Sweet & Maxwell). The principle was applied by Viscount Radcliffe in *Kok Hoong v. Leong Cheong Kweng Mines, Ltd* [1964] 1 All ER 300 as follows:

> The respondent has invoked in support of its defence a principle which appears in our law in many forms, that a party cannot set up an estoppel in the face of a statute. Thus a corporation on which there is imposed a statutory duty to carry out certain acts in the interest of the public cannot preclude itself by *estoppels in pais* from performing its duty and asserting legal rights accordingly ...
>
> It does not appear to the their Lordships that the principle is confined to transactions that have been made the subject of legislation ... the common law may itself prohibit the enforcement of certain contracts such as those of an infant not for necessaries, and it cannot be supposed that it would any the less refuse to base a judgment on an estoppel against an infant who had so contacted. An infant

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> who ... obtained goods ... by representing himself to be of full age cannot be estopped from setting up his infancy, ...
>
> ... It has been said that the question whether an estoppel is to be allowed or not depends on the whether the
B enactment or rule of law relied on is imposed in the public interest or "on grounds of general public policy". ... However, a principle as widely stated as this might prove to be rather an elusive guide, since there is no statute, at least public general statue, for which this claim might not
C be made. In their Lordships' opinion **a more direct test** to apply in any case such as the present, where the laws of money lending or monetary security are involved, *is to ask whether the law that confronts the estoppels can be seen to represent a social policy to which the court must give effect in the interest of the public generally or some section of the pubic, despite any rule of evidence as between themselves that the parties may have created by their conduct or otherwise.* Thus the laws
D of gaming or usury (*Carter v. James*) **override an estoppel**: so do the provisions of the Rent Restriction Acts with regard to orders for possession of controlled
E tenancies (*Welch v. Nagy*). (emphasis added)

[21] Whether s. 9 of the Employees Provident Fund Act 1951 and/or s. 47(1) of the Employees Provident Fund 1991 prohibited contracting out or waiver?

F I find that s. 9 of the Employees Provident Fund Act 1951 and/or s. 47(1) of the Employees Provident Fund Act 1991 prohibited contracting out or waiver for the reasons stated in para. (20) above.

G **[22]** Whether estoppel, waiver or acquiescence can prevail against a statute of public policy or to protect against an illegality?

I find that estoppel, waiver or acquiescence cannot prevail against a statute of public policy or to protect against an illegality for the reasons stated in para. (20) above.

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[23] Whether the defendant can raise and rely on a defence of illegality to bar the plaintiff's claim?

(i) I agree with the contention of the plaintiff that this was never
I raised in the defendants' pleadings and that it was only raised after the trial. Nonetheless, it is trite law that it is always open to a court to take cognizance of illegality at any stage of the proceedings even though it has not been pleaded.

(ii) I find that there are no merits in this defence of the defendants based on the following:

(1) Section 66 Contracts Act 1950 states:

> When an agreement is **discovered to be void**, or when a contract **becomes void**, any **person who has received any advantage** under the agreement or contract is **bound to restore it, or to make compensation** for it, to the person from whom he received it. (emphasis added)

(2) *Sinnadurai, on Law of Contract* (3rd Edition), said that section 66 operates when the contract is discovered to be void or becomes void. The test is whether at the time the contract was made, the parties were aware of the illegality.

(3) The knowledge of the parties were never made into an issue. The Defendant never pleaded that the Plaintiff was aware of the illegality or *vice versa*. Clearly, this a non-issue. As such, section 66 of the Contracts Act 1950 empowers the sums that have been deducted to be returned to the Plaintiff.

(iii) In any event, I find that the defendants fall foul of the principle of *Allegans suam turpitudinem non est audiendus* (a person alleging his own wrongdoing is not to be heard).

(iv) Bennion said:

> Unless the contrary intention appears, an enactment by implication imports the principle of the maxim *Allegan suam turpitudinem non est audiendus* (a person alleging his own wrongdoing is not to be heard).

Order

[24] In the light of the above, I therefore entered judgment in favour of the plaintiff in terms as prayed for in the statement of claim.